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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 497

149 MADISON AVENUE CORP. and WILLIAMS & CO., INC.,
Petitioners,

against

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH McARDLE, SAMUEL MANNE, CORNELIUS McCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER,
Respondents.

BRIEF FOR PETITIONERS

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Opinions Below

The opinion of the District Court (R. 184-203) is reported at 65 F. Supp. 385. The opinion of the Circuit Court of Appeals (R. pp. 81-85) is reported in 156 F. 2d 139.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on June 17, 1946 (R. p. 84). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. The petition for a writ of certiorari was filed on September 13, 1946 and originally denied on October 28, 1946. Pe-

tition for rehearing was filed on November 22, 1946 and granted on December 9, 1946. The order denying certiorari was vacated and the writ granted on December 9, 1946.

Question Presented

Pursuant to a Directive Order of the National War Labor Board made on July 29, 1942, an employers' association of which petitioners are members and a labor union of which all respondents except two are members,[1] entered into a collective bargaining agreement (known as the National War Labor Board Agreement) fixing terms and conditions of employment for thousands of building service employees in a large number of loft, office and apartment buildings in New York City, for the period April 21, 1942 to April 20, 1945. The Directive Order of the Board and the resultant master agreement were made subsequent to the decision of this Court in *Kirschbaum* v. *Walling*, 316 U. S. 517, holding the Fair Labor Standards Act applicable to loft buildings tenanted by manufacturers producing goods for interstate commerce. The employers and the union intended, as the War Labor Board recognized, to bring the wage and hour provisions of their agreement applicable to loft and office building employees into compliance with that Act.

For a regular workweek of 46 hours the agreement provided weekly earnings or "take home" pay which included overtime pay for the regular workweek at time and one-half the contract hourly rates computed on the basis of the following formula, which is nothing more than a restatement of the Act's overtime requirements:

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[1] Respondents, John H. Berger and Frank Rodriguez, sometimes identified on the payrolls as Sanchez, were members of another union and were not subject to the NWLB Agreement as such. However, they agreed that their hourly rates would be calculated as provided in that Agreement (R. 153-155).

> "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours."

The hourly rates so computed were set forth on the payrolls and acknowledged weekly by the employees and were actually applied at all times whether they worked fewer hours or more hours than the scheduled workweek of 46 hours. The agreement provided that it should not be construed to lower the hourly rate presently received by any employee.[2]

The question presented is whether the hourly rates computed by the terms of the master agreement and set forth on the payrolls are the "regular rates" for purposes of overtime under Section 7 (a) of the Fair Labor Standards Act of 1938 or whether the *Missel* formula (wage divided by hours equals regular rate, 316 U. S. 572, 580) applies despite the contrary agreement and practice of the parties.

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[2] The NWLB Agreement was signed on September 1, 1942. For the period after September 1, the hourly rate fixed thereby for all respondents except Berger and Rodriguez, who were not members of Local 32-B and not subject to this provision, are higher than their hourly rates under the preceding Sloan Agreement which expired on April 20, 1942 computed on the basis of the *Missel* formula. Wages and hourly rates under the NWLB Agreement were made retroactive to April 21, 1942 by agreement between the union and the employers as suggested by the War Labor Board. Even during this retroactive period the hourly rates fixed by the master agreement are higher than those effective at the expiration of the Sloan Agreement, except for McCole, the watchman. See Appendix A.

Statute Involved

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., Secs. 201, *et seq.*) are as follows:

> Sec. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * * *
>
> (3) For a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed.

Statement

(a) *Preliminary*

Petitioners, owner and managing agent, employed respondents in a loft building in New York City. It is conceded that the work performed by respondents is covered by the Act (R. 220). While the original complaint covered the period October 24, 1928 to April 20, 1942, by amendment at the trial, the period was extended to December 10, 1943, being the date the action was commenced. The period which is now involved is April 21, 1942 to December 10, 1943, since all issues prior thereto have been settled (R. 214-225).

There was no oral testimony with respect to the phase of the case now involved. The facts with respect to the issues are found in two stipulations (R. 119-135, 139-159) and five exhibits which are bound separately and handed up to this Court pursuant to agreement between the attorneys (R. 115-117).

It is stipulated that for the period, April 21, 1942 to December 10, 1943, respondents "were employed and paid in accordance with the terms and conditions of employment provided in a collective bargaining agreement known as the National War Labor Board Agreement" between Realty Advisory Board on Labor Relations, Inc., on behalf of the various signatory employers, and Local 32B, Building Service Employees International Union, A. F. of L., on behalf of the employees (Pl. Ex. 2, R. 120-122). That agreement fixed a regular workweek for employees, other than watchmen, of 46 hours; for watchmen, of 54 hours. It also provided for weekly earnings for all workmen employed thereunder for the stipulated regular workweek, and stated that "it is the intention of the parties that the wages paid, as provided for in this agreement, * * * shall constitute full payment for services rendered under this agreement * * *" (Pl. Ex. 1, Article III, par. 6, p. 7).

In addition to providing for earnings for the regular workweek, the NWLB Agreement providing a formula for determining hourly rates which governed the payment of non-overtime and overtime where the hours worked were less than or more than the agreed regular workweek. Express hourly rates were also fixed for those employees having no regular workweek. The agreement provided that it should not be construed to lower the hourly rate presently received by any employee (Pl. Ex. 1, Art. III, par. 12, p. 6). It expressly provided an overtime rate of "at least time and one-half" for all hours worked in excess of 40 hours per week. Employees, other than watchmen, working more than 46 hours per week or more than 9½ hours per day, are paid "an overtime rate of time and three-quarters" for such overtime. Watchmen working more than 54 hours per week or more than 11½ hours per day, are paid double time (Pl. Ex. 1, "Hours And Hourly Rates", pp. 27 to 30).

It is clear, therefore, that the regular weekly earnings or wages directed by the War Labor Board and incorporated by the parties in their agreement included full payment for all overtime embraced within the regular workweek of 46 or 54 hours, as the case might be, and not merely payment for non-overtime hours. Failure to grasp this fact was the source of the basic legal error in the District Court's decision. The Court in assuming (R. 198-199) that plaintiffs were employed for a fixed workweek at a fixed weekly wage, ignored the fact that the so-called fixed wage included overtime and was intended to be full compensation for such a workweek.

(b) *Background of Agreement*

Since 1934, a substantial number of owners of loft, office and apartment buildings, in the Borough of Manhattan have bargained collectively with Local 32B regarding the terms and conditions of employment of their building service employees. A brief history of this relationship and a description of the resulting agreements is set forth in the Report and Recommendations of the Mediation Panel of the National War Labor Board (Pl. Ex. 4, pp. 4 to 17 inclusive). More than 2,200 separate buildings, including approximately 700 loft buildings, have been involved. In these negotiations, there have been two distinct sets of agreements; one set (McGrady Agreement, February 4, 1939 to February 3, 1942; Meyer Agreement, February 4, 1942 to February 3, 1945) known as the Garment Center Agreements, between Local 32B and the Midtown Realty Owners' Association, Inc. and the Penn Zone Association, Inc., covering loft and office buildings in the Garment Area; the other (Sloan Agreement, April 24, 1939 to April 20, 1942; National War Labor Board Agreement, April 21, 1942 to April 20, 1945) between Local 32B and the Realty Advisory Board on Labor Relations, Inc., covering loft, office and apartment build-

ings elsewhere in Manhattan. The pattern of the two sets of agreements was naturally similar.

During the period April 24, 1939 to April 20, 1942, the respondents were employed pursuant to the Sloan Agreement (Pl. Ex. 2, R. 126; Pl. Ex. 3). Weekly wages of $24 for a 47-hour week (watchmen, 59 hours) were established for Class "C" loft buildings, that being the classification of the building in controversy (R. 121). The Sloan Award, following an interim arbitration of wages and hours called for by the basic agreement, resulted in the raising of the weekly wage for Class "C" lofts to $25 per week, effective October 20, 1940 (Pl. Ex. 4, pp. 12-13).

The Sloan Agreement contained no provision, express or implied, that the regular weekly wage included overtime and there was no provision for determining hourly rates. The only rates mentioned were weekly rates for various jobs and for classes of buildings. There was no provision for overtime between 40 hours per week and the regular workweek of 47 hours. The Sloan Agreement as well as the McGrady Agreement in the Garment Center were negotiated in 1939, at a time when both laymen and lawyers, entertained no serious thought that building service employees of independent landlords were "engaged in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act. See, *Fleming* v. *Arsenal Building Corporation,* 38 F. Supp. 207, Woolsey, J. (S. D. N. Y., April 11, 1941); *Killingbeck* v. *Garment Center Capitol, Inc.,* 259 App. Div. 691 (1st Dept. June 7, 1940), leave to appeal denied, 259 App. Div. 1076, 284 N. Y. 818.

The story of the tidal wave of retroactive liabilities which engulfed loft building owners and managing agents in New York City and throughout the nation after this

Court decided *Kirschbaum* v. *Walling*, 316 U. S. 517, is well known.[3]

The Sloan Agreement provided (Pl. Ex. 3, p. 21) that by February 1, 1942 the parties would enter into negotiations for a new agreement. Meanwhile the decision of the Circuit Court of Appeals for the Second Circuit in *Fleming* v. *Arsenal Building Corporation*, 125 F. 2d 278, entered the picture on December 30, 1941. This involved a building in the Garment Center under the Meyer Agreement which was due to expire on February 3, 1942. As a result the Union and the two Associations, in the Garment Area, after an arbitration before Mr. Arthur S. Meyer, Chairman of the New York State Mediation Board, entered into the Meyer Agreement, covering the period February 4, 1942 to February 3, 1945, which for the first time in the bargaining between Local 32B and the owners, fixed hourly rates governing the employment of all classifications of employees (Pl. Ex. 4, pp. 16-17; 33-34; 70-72).

Local 32B and the Realty Board commenced negotiation in March, 1942 for a new agreement to succeed the Sloan Agreement and the matter ultimately went before the National War Labor Board in Washington, D. C. (Pl. Ex. 4, pp. 6, *et seq.*). The Panel's Report which the Board adopted, states at pages 33 to 34:

> "It was understood at the hearing that if the Board set hours for office and lofts above the 40-hour

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[3] *Adams* v. *Union Dime Savings Bank*, 53 F. Supp. 782, aff'd 144 F. 2d 290 (C. C. A. 2, 1944), certiorari denied 323 U. S. 751, October 16, 1944; *O'Neil* v. *Brooklyn Savings Bank*, 267 App. Div. 317 (1st Dept., 1943), aff'd 293 N. Y. 666, aff'd 324 U. S. 697; *Gangi* v. *D. A. Schulte, Inc.*, 53 F. Supp. 844, reversed 150 F. 2d 694, aff'd U. S. , 90 Law ed. (Adv. op.) 873; *Borden Co.* v. *Borella*, 325 U. S. 679.

The estimated liability of building owners in New York City if the decision in the present case stands, exceeds $10,000,000, New York Sun, January 10, 1946, p. 12.

maximum demanded by the Union, the parties would adopt the formulae of the Meyer Agreement for the calculation of hourly rates, and the fixing of overtime. These formulae were introduced because of the prospective application to loft buildings of the Fair Labor Standards Act. We quote and explain them in Appendix B. As they have been accepted in principle by the parties, we believe they should be incorporated into the present contract."

At the hearing before the Board it was understood and agreed that the new wages and hourly rates agreed upon by the parties or ordered by the Board, would be retroactive to April 21, 1942, when the Sloan Agreement expired (Pl. Ex. 4, p. 49; Pl. Ex. 2; R. 133).

(c) *Application of Hourly Rates under the Agreement*

Pursuant to the Directive Order (Pl. Ex. 4), the Union and the Realty Advisory Board on Labor Relations, Inc., on September 1, 1942, signed the NWLB Agreement. This agreement (Pl. Ex. 1, Article VIII, p. 12), provides that the agreement is to take effect September 1, 1942, except that the wages, hourly rate formulae and the hourly wage rates, provided for in the agreement, shall be effective retroactively to April 21, 1942, and that the formulae and the hourly rates for the period, April 21 to September 1, 1942, shall be computed on the basis of the hours provided in the Sloan Agreement (which, of course, had already been worked). This merely carried out the previous agreement of the parties and the suggestion of the Board in line with normal and sound practice in such matters.

Pursuant to the retroactive clause in the agreement, the respondents who were members of the Union were paid the retroactive increase (Pl. Ex. 6—retroactive payroll for period, April 21, 1942 to September 5, 1942, p. 35

of Exhibit Volume). All work performed from April 21, 1942 to September 5, 1942 was performed in anticipation of and subject to the new wages of which the hourly rates were an integral part. Obviously, the new hourly rates for this period could not be reflected on the current payrolls and it was not practicable to recompute the payrolls and make adjustments at the new rates reflecting absences, both excusable and inexcusable. Instead a flat amount was paid as though each employee had worked regularly during the period. On this basis more was paid the employees than required by the agreement.

The Circuit Court's comment (R. p. 85) on this retroactive arrangement was unwarranted in fact or in law. Said the Court: "The attempt to make the contract consummated in September retroactive to April 20 but highlights the illusion that the new contract was more than a continuation of the old wage arrangement which did not comply with the statute. The right to overtime pay which had already accrued to these appellees could not thus be waived." Since overtime was worked during this period, respondents were entitled to payment therefor in accordance with the Act. But the liability had not yet accrued since the wage rates governing employment for this period were still in negotiation and overtime could not possibly have been computed. "But Section 7 (a) does not require the impossible. If the correct compensation cannot be determined until some time after the regular pay period, the employer is not thereby excused from making the proper computation and payment. Section 7 (a) requires only that the employees receive a 50% premium as soon as convenient or practicable under the circumstances." *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, 432.

Nor does the retroactive application of the new agreement to cover the negotiating period show a continuation of the old arrangement. Such a conclusion ignores the

fundamental transition from the Sloan Agreement which merely fixed non-overtime wages for a fixed workweek of 47 hours without any provision for overtime within the 47 hour workweek (excepting daily overtime which was paid after 9½ hours per day) and the NWLB Agreement which provided for total earnings inclusive of overtime for the regular workweek in excess of the weekly wage under the Sloan Agreement, and expressly required overtime after 40 hours per week and 9½ hours per day on the basis of the hourly rate derived from an express formula.

The formula of the NWLB Agreement (following that of the Meyer Agreement) for determining the hourly rates of the respondents and the provisions for payment of wages, whether overtime or non-overtime, on the basis of these rates, is set forth in detail at pages 27 to 30 of the Agreement (Pl. Ex. 1). The essence of the formula fixing the rates is as follows:

> "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours."

At the moment the agreement became effective, there was immediately fixed for each respondent a definite hourly rate: the quotient of the employee's prospective earnings for his regular workweek divided by 50.5 (hours regularly employed, or 47, plus one-half the number of hours regularly employed in excess of 40 hours, or 3.5, equals 50.5).[4] Thus the hourly rate of the respondent

[4] The divisor for watchmen, such as respondent McCole, whose regular workweek under the agreement was 54 hours, was 61 (54 plus one-half the hours in excess of 40, or 7, equals 61).

Peterson at the effective date of the agreement was $.544, being the quotient of $27.50, his prospective earnings for a regular workweek under the NWLB Agreement and 50.5. As demonstrated in detail later, this hourly rate was constant and determined his wages in all given situations, whether he worked less hours or more hours than his regular workweek. Peterson's hourly rate, as well as those of the other employees, thus fixed at the effective date of the agreement, changed only when his regular workweek was shortened or when his prospective earnings for his regular workweek were increased pursuant to the agreement. Such a change of rate occurred when Peterson's regular workweek changed from 47 hours per week to 46 hours per week beginning August 10, 1942, in anticipation of the signing of the NWLB Agreement. His rate then became $.561 per hour ($27.50, prospective earnings, divided by 49). His rate changed again as of April 21, 1943 when, pursuant to an interim arbitration award under Article III, par. 3, page 6 of the agreement, his earnings for a regular workweek were increased to $28.90. His rate then became $.589 ($28.90 divided by 49).

The individual hourly rates resulting from the NWLB Agreement were incorporated into the payrolls which the respondents signed each week. The payrolls show that these rates were actually applied in determining respondents' pay whether their hours exceeded or were less than the regular workweek. The Trial Court so found (R. 200-201).

Respondent members of the Union were paid retroactively pursuant to Article VIII (Pl. Ex. 1, p. 12) of the agreement. Each received an increase of $2.50 over his weekly pay under the Sloan Agreement but on the understanding that the newly agreed weekly earnings included overtime inherent in the regular workweek. The

formula was then applied on the basis of the hours under the Sloan Agreement (47 hours) and the prospective earnings of $27.50 ($25 plus $2.50 increase). To illustrate, respondent Peterson, under the Sloan Agreement, worked 47 hours for a weekly wage of $25. Under the retroactive clause of the NWLB Agreement, Peterson received a $2.50 increase, bringing his earnings to $27.50—$27.50 divided by 50.5 (47 plus 3.5 hours) pursuant to the formula, equals $.544. 40 times .544 = $21.78 plus 7 times .816 (time and one-half) = $5.72, or $27.50. Respondents therefore were entitled to a retroactive payment of $2.50 for each of the regular workweeks actually worked during the period, April 21, 1942 to September 5, 1942 which they received (Pl. Ex. 6—retroactive payroll for period, April 21, 1942 to September 5, 1942, page 35 of Exhibit Volume).

For the period, September 20, 1942, to December 10, 1943, each respondent was paid on the basis of the hourly rate appearing on the payroll records (rates for period April 21, 1943 to October 29, 1943 were later subject to a retroactive adjustment). Each weekly payroll shows the number of hours worked each day, the number of non-overtime hours (40 or less), the hourly rate, wages paid for non-overtime hours, the number of overtime hours, the basis upon which the overtime hours were compensated for, *i. e.*, 150% of the hourly rate for hours between 40 and 46 and 175% of the hourly rate for hours in excess of 46, or in excess of 9½ per day, the total number of hours worked each week and the total pay (Pl. Ex. 6, pp. 36-103 of Exhibit Volume).

A schedule is annexed to this petition as "Appendix A", showing the hourly rate (adjusted, of course, to show the two retroactive increases) for each respondent for the period April 21, 1942 to December 10, 1943. These rates are shown in relation to respondents' hourly rates

effective at the expiration of the prior Sloan Agreement on April 20, 1942 as computed on the *Missel* formula. For the period, April 21, 1942 to September 5, 1942, the hourly rates were determined by the formula, using the wage increase under the NWLB Agreement plus the wages under the Sloan Agreement and the hours under the Sloan Agreement. For the period, September 20, 1942 to April 20, 1943, the hourly rates are those shown on the payroll records. For the period, April 21, 1943 to October 29, 1943, the hourly rates are those shown on the payrolls plus the increase given in October, 1943, retroactive to April 21, 1943 (Pl. Ex. 6, p. 97 of Exhibit Volume). For the period, October 30, 1943 to December 10, 1943, the hourly rates are those shown on the payroll records.

Respondents were compensated on the basis of these hourly rates for all time worked by them, whether the hours exceeded or were less than 40 hours per week.

For example, respondent Peterson was absent for inexcusable cause for three days or 23 hours during the week February 28, 1943 to March 6, 1943 (Defs. Ex. B, par. 2(b) and (c), R. 143-145). He therefore worked 23 hours and was paid $12.90 (23 hours x .561, hourly rate; see Pl. Ex. 6, p. 60 of Exhibit Volume).

It does not appear that Peterson or any other respondent was ever absent inexcusably for only part of a day during any workweek. Assuming, however, for the period August 10, 1942 to April 20, 1943 when Peterson's hourly rate was .561, that he worked only 42 hours in a given week and was inexcusably absent for 4 hours, his pay would have been computed as follows: 40 hours (regular time) x .561 (regular hourly rate) or $22.44 plus 2 hours (overtime) x .843 (overtime rate) or $1.68, making a total of $24.12 (Defs. Ex. B, R. 143).

The method of treating excusable absences is set forth in Defendants' Exhibit B, par. 2(a) (R. 141-142). During the week of December 13 to 19, 1942, Peterson worked 30 hours, being absent for excusable cause two days or 16 hours. He was paid $13.44 (24 hours x .561) plus $5.06 (6 hours x .843) or a total of $18.50 (see Pl. Ex. 6, p. 48 of Exhibit Volume). Pursuant to the Agreement, Section III, par. 5 (i), p. 29, there was deducted from Peterson's earnings, $9.00 (16 hours x .561) for these excusable absences.

Pursuant to the agreement, employees, other than watchmen, working more than 46 hours per week were paid an overtime rate of time and three-quarters. During the week of January 24, 1943 to January 30, 1943, Peterson worked six days for a total of 52 hours. For that week he received $22.44 (40 hours x .561) plus $5.06 (6 hours x .843) plus $5.88 (6 hours over 46 hours x .98, time and three-quarters) or a total of $33.38 (See Pl. Ex. 6, p. 55 of Exhibit Volume).

(d) *Analysis of Opinions Below*

While the District Court found as a fact that petitioners "here actually applied in all situations the hourly rates so derived" (*i. e.*, from the formula), he ruled that: "The manner in which the hourly rate is determined and not the application of an hourly rate is the test" (R. 200-201). The formula was held ineffective under Section 7(a) because: "The hourly rates derived by the use of the formula bore no relation to the regular rate of the workweek as defined in *Overnight Motor Co.* v. *Missel*" (R. 198).[5]

[5] While the District Judge apparently read the formula as calling for a variable weekly rate thus explaining his comment that: "In practice the formula was not strictly followed" (R. 197), he nevertheless found that the rates "did not so vary but remained the same

(*Continued on following page*)

In response to petitioners' attack on the Trial Court's ruling and their argument that the *Missel* formula has no application where the parties have agreed upon weekly earnings, inclusive of overtime, for a fixed regular workweek, and have also agreed upon a formula for allocating those earnings to non-overtime and overtime which is no more than a restatement of the Act's requirements, the Circuit Court said: "In the absence of any attempt to circumvent the statute we might agree" (R. p. 84). But the Circuit Court's holding of circumvention is based on nothing more than the District Court's findings (No. 18 and No. 19, R. 171-172) as to the purpose of the formula which are a repetition of the War Labor Board's description of how the formula operates and a patently unsound legal test that compliance with the Act requires payment of more than the agreed weekly wage for a workweek exceeding 40 hours; or to put it another way, there can never be an effective agreement upon weekly wages inclusive of overtime.

It begs the question to say that the formula is bad because it reduces the hourly rate below what it would be if computed in the ordinary way (*i. e.*, the *Missel* formula that hourly rate equals weekly wages divided by weekly hours) "so the payment of time and a half for overtime would not bring the total weekly earnings substantially above the weekly rates set by the agreement." The question is whether anything in the Act makes the ordinary way of computation mandatory where the parties have made the type of agreement here involved.

The Circuit Court's holding that the NWLB Agreement "does negate the statutory purposes" is also based upon

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from week to week as if the plaintiff actually worked only the regular workweek" (R. 73). Between April 20, 1942 and December 10, 1943, the hourly rates remained fixed except when the agreed weekly earnings or agreed regular workweek were changed pursuant to the agreement. This reflected the understanding of the parties and the War Labor Board (Appendix B, Pl. Ex. 1, pp. 70-71).

total disregard of the fact, as found by the District Court, that the formula rates were "actually applied in all situations." This is manifest from the Court's reference to a fixed weekly wage "seemingly transferred into an hourly rate" and to "an illusion of overtime pay after a forty hour workweek where there can be no increase in pay per workweek because of overtime unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed workweek."[6] There is nothing "seeming" or "illusionary" about hourly rates that are actually applied.

The District Court misapprehended the true bearing of the more recent decisions of this Court dealing with Section 7(a) of the Act. The Circuit Court adopted an untenable legal test of validity under Section 7(a) and ignored the plain facts of the case as well.

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[6] The Circuit Court attempts to bolster its argument that the regular rate was a fixed weekly wage by reference to certain alleged payroll discrepancies not mentioned by the District Court. "The slight discrepancies were then simply ignored and the agreed weekly rate was always paid instead of what would be due under the formula" (R. p. 84). Obviously where an employee worked his regular workweek, the amount due under the formula was necessarily the agreed weekly earnings, which included overtime. The Circuit Court apparently refers to the fact that hourly rates and overtime rates derived from the formula were only carried to three decimals and therefore the extensions of these rates were not accurate to the exact cent. However, the existing decisions confirm petitioners' practice of carrying the hourly and overtime rates to the nearest tenth of a cent per hour. *Snyder* v. *Wessner*, 55 F. Supp. 971, 976; *Anderson* v. *Federal Cartridge Corp.*, 62 F. Supp. 775, 785.

There are also some errors in the payrolls. But occasional errors cannot obscure the fact that in general the contract rates were correctly computed, set forth and applied on the payrolls. A gross miscarriage of justice would result if occasional errors by a payroll clerk were used to invalidate a collective bargaining agreement affecting hundreds of employers.

Specification of Errors

The Circuit Court erred:

1. In holding that the contract hourly rates fixed by the NWLB Agreement were not the regular hourly rates for purposes of overtime under Section 7(a) of the Act.

2. In holding that the respondents were entitled to overtime, liquidated damages of equal amount, attorneys' fees and costs under Section 16(b) of the Act.

Summary of Argument

Under the Act employers and employees may establish the regular rate contractually at any point at or above the minimum provided in Section 6 and the contract rate will be adjudged the regular rate in determining compliance with Section 7 if it is the rate "actually paid for the normal, non-overtime workweek".

Here the employer and employees, pursuant to a master collective bargaining contract covering hundreds of employers and thousands of employees, agreed upon a fixed regular workweek and fixed wages for that workweek inclusive of overtime ($27.50 per week for 46 hours for a majority of respondents during most of the period involved). The master agreement provided an express formula for calculating regular hourly rates which was simply an algebraic restatement of the requirements of Section 7. (Agreed weekly wages divided by the hours of the regular workweek plus half the hours by which the regular workweek exceeded 40; or, in the above example, $27.50 divided by 49 = $.561 per hour.) The master agreement required payment for overtime after 40 hours per week at 150% of the contract hourly rate and after 46 hours per week at 175% of the contract hourly rate. The hourly rates thus fixed were "actually applied

in all situations", as the District Court found, whether the respondent employees worked more hours or less hours than the regular workweek or the statutory workweek.

The District Court erred in ruling that the *Missel* formula (wages divided by hours equals regular rate) applies where the parties have agreed that the stipulated wage for a regular workweek exceeding 40 hours includes overtime and have adopted an express formula for calculating the hourly rate. The Circuit Court's conclusion that the statutory purposes are negated because there is only "an illusion of overtime pay after a forty hour workweek where there can be no increase in pay per workweek because of overtime work unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed workweek", conflicts with *Walling v. Belo,* 316 U. S. 624 and with the decisions of several circuit courts. This test unreasonably limits the scope of collective bargaining in that it precludes any agreement between employer and employee upon "take home" pay for a workweek exceeding 40 hours per week. Its unsoundness is demonstrated by the fact that it would invalidate other types of agreements involving regular employment for hours exceeding the statutory workweek, particularly those current during the war emergency and not heretofore regarded as offending the Act.

Moreover, the Circuit Court plainly disregarded the facts since the hourly rate was actually applied in this case and was in no sense fictional. The contract hourly rate was paid for hours worked of 40 or less per week; 150% of that rate was paid for hours between 40 and 46 per week and 175% for hours exceeding 46. The contractual provision whereby employees did not lose the benefit of their normal overtime pay because of excusable absences for illness or because of recognized holidays show no evasive departure from the contract rate in the "normal, non-overtime workweek". Workweeks where more than the contract rate was paid for these reasons

are not "normal". To treat them as such for the purpose of impeaching the genuineness of the contract rate penalizes the employer for following established and liberal practices, circumscribes the power to deal with abnormal situations in collective bargaining where the employee loses work time without fault and in the end injures the employees whose interests the Act sought to benefit.

The contract hourly rates were applied in all normal situations and should therefore be adjudged the real or "regular" rate for purposes of Section 7 (a) of the Act.

ARGUMENT

I

The hourly rates fixed by the terms of the National War Labor Board Agreement, set forth on the payrolls and acknowledged weekly by the employees in this case were the rates paid for "normal, non-overtime" hours and the basis of all overtime pay and were, therefore, the "regular rates" under Section 7 (a) of the Act.

(a) Reality of contract rate is this Court's test under Section 7 (a).

The cases in this Court dealing with Section 7 (a) of the Act reflect a common principle. The "regular rate" under Section 7 (a) must be a real rate, not a fictitious one. Employers and employees are free by collective bargaining to establish the "regular rate" at any point at or above the minimum prescribed by Section 6 subject to one condition:—

> "The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments."
>
> *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, at page 424.

"* * * we look not to contract nomenclature but to the actual payments, exclusive of those paid for overtime, which the parties have agreed shall be paid during each workweek."

Walling v. *Harnischfeger Corp.*, 325 U. S. 427, at page 430.

"While the words 'regular rate' are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek."

Walling v. *Helmerich & Payne*, 323 U. S. 37, at page 40.

If the regular rate were not computed so as to reflect all payments regularly made for non-overtime work, the statutory purposes would obviously be frustrated as pointed out by Mr. Justice Murphy in *Walling* v. *Harnischfeger Corp.*, at page 430:

"To compute overtime compensation from the lower and unreceived rate is not only unrealistic but is destructive of the legislative intent. A fully 50% increase in labor costs and a full 50% wage premium, which were meant to flow from the operation of Section 7 (a), are impossible of achievement under such a computation."

In *Walling* v. *Belo Corp.*, 316 U. S. 624, the majority opinion and the dissenting opinion do not disagree upon the basic principle. The opinion for the Court says (p. 631):

"In its initial stage the question to which this dispute gives rise is a question of law, a question of interpretation of the statutory term 'regular rate' But it is agreed that as a matter of law employer and employee may establish the 'regular rate' by contract."

And the dissenting opinion states (p. 636):

"The Court's interpretation that, in the absence of bad faith, any form of contract which assures

the payment of the minimum wage and the required overtime complies with the Act may be assumed to be correct."

The sharp disagreement between the opinions lay in the dissenting view (p. 638) "that the guaranty was the heart of the arrangement" and that "until these hours are exceeded (54½ per week), the stipulated wage per hour has no demonstrable effect" (p. 637).

Close reading of the opinions of both courts below discloses that the District Court and the Circuit Court do not agree as to their reasons for condemning the NWLB Agreement. The District Court (R. 198-200) arbitrarily treated the weekly earnings for the regular workweek as a regular weekly wage for non-overtime hours and applied the formula of the *Missel* case, 316 U. S. 572 as the only lawful method of computing the hourly rate. That treatment was clearly erroneous because it disregarded the agreement between the parties that the weekly earnings included all overtime inherent in the regular workweek and that a formula other than the *Missel* formula should be used to calculate the hourly rate. It also disregarded the legal bearing of the finding that the hourly rates derived from the formula were the rates actually paid for hours less than or more than the regular workweek.

Under the decisions of this Court referred to above, the regular rate is computed from the regular weekly payments, "exclusive of overtime." Allocation of non-overtime earnings and overtime is precisely the function of the formula. In the formula the hourly rate necessarily reflects all non-overtime payments for the regular workweek.

The *Missel* formula was intended to apply only as a means of reducing weekly straight time, or non-overtime wages to an hourly rate. The presence of overtime in the agreed weekly wages or earnings destroys its ap-

plicability. The *Missel* formula has never been regarded by this Court, by the Circuit Courts or by commentators on this Court's decisions under the Act as absolute in the face of contrary agreement by employer and employees.[7]

(b) Second Circuit Court's test conflicts with this Court and other Circuits and produces unreasonable results.

The Circuit Court below apparently disagrees with the District Court that the *Missel* formula is mandatory and that the formula used in this case and in the *Bergschneider* and *Shepler* cases is *per se* invalid (R. p. 83). However, as the formula was used here, the Circuit Court thought the statute had been circumvented. Said the Court (R. pp. 83-84):

> "The result was employment at whatever regular workweek and at whatever regular weekly wage the parties saw fit to agree upon which remained constant regardless of work in excess of forty hours per week which was not in excess of the number of hours in the agreed workweek (this statement is plainly at odds with the facts; indeed, with an express stipulation on the point (R. 143) * * * It does negate the statutory purposes to base employment upon a regular unvarying weekly wage for a workweek in excess of the statutory minimum hours and then merely break that down into so-called regular

[7] "We, of course, express no opinion as to the proper computation of the regular rate under other circumstances. Nor do we intend to indicate that the formula we have used as satisfying the statutory requirements (i.e., the *Missel* formula) is the only one which respondent could adopt as complying with them." *Walling* v. *Helmerich & Payne*, footnote, p. 41.

"There was no agreement providing for an hourly rate of pay or that the weekly salary included additional compensation for overtime hours" *Warren-Bradshaw Co.* v. *Hall*, 317 U. S. 88, 93. While the *Missel* formula was there held to govern the determination of

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and overtime hourly rates by means of a formula so the weekly wage actually definitely fixed is seemingly transferred into an hourly wage rate. That amounts but to an illusion of overtime pay after a forty hour workweek where there can be no increase in pay per workweek because of overtime work unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed workweek."

No subtle analysis is required to demonstrate that the test by which the Second Circuit Court of Appeals condemned the NWLB Agreement invalidates any wage plan fixing or guaranteeing compensation on a weekly or monthly basis for a regularly scheduled workweek exceeding forty hours or an irregular workweek habitually exceeding forty hours per week. Thus the critical test applied by the Court below is in conflict with the decision of this Court in *Walling* v. *Belo*, 316 U. S. 624, with the Fifth Circuit Court which initially sustained the *Belo* type of contract, the Ninth Circuit Court of Appeals as illustrated by its decision in *Walling* v. *Halliburton Oil Well Cementing Co.*, 152 F. 2d 622, now scheduled

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the hourly rate, the quoted language certainly suggests that it would have no application to the type of agreement here involved.

In *Bergschneider* v. *Peabody Coal Co.*, 142 F. 2d 784 (C. C. A. 7) and *Shepler* v. *Crucible Fuel Co.*, 140 F. 2d. 371 (C. C. A. 3) the stated hourly rates were computed as the quotient of agreed weekly earnings inclusive of overtime and the sum of the agreed weekly hours plus one-half the hours in excess of the statutory workweek. Certainly no sound distinction rests in the fact that there the hourly rate was expressly stated and here it had to be computed, where the computing formula is identical.

"The result (referring to *Walling* v. *Harnischfeger Corp.*) is consistent with the *Missel* case, which may be regarded as holding that, *at least in the absence of some clear provision to the contrary in the contract*, the regular rate should be ascertained by dividing total weekly earnings by hours worked." Dodd, "The Supreme Court and Fair Labor Standards, 1941-1945", 59 Harvard L. Rev. 321, 363 (Italics ours.)

It would be difficult to draft a clearer "provision to the contrary" than the formula of the NWLB Agreement.

for argument with the present case as Docket No. 74 and the Sixth Circuit Court in *Walling* v. *General Industries Co.*, 155 F. 2d 711, also scheduled concurrently for argument as Docket No. 564.

Recognition of the social and economic desirability of encouraging stabilized earnings in types of business and industry where hours are necessarily irregular is, of course, the articulate premise of the *Belo* decision.[8] Where hours of employment are more or less regular, as in the operation of commercial real estate, security is valued no less by employees. Moreover, certainty of cost for normal operations is a great advantage if not an indispensable requisite to the employer who must fix the price for his goods or services far in advance of performance. Here the employee thinks more naturally in terms of "take home" pay rather than of hourly rates just as the employer thinks of ultimate labor cost. Here both are more predictable because of the normal regularity of employment. But, paradoxically, where both employer and employee have counted heavily on predictability of the final result in dollars and cents of take-home pay and labor cost, the Court below by its legal test outlaws any form of agreement which reduces normal predictability to certainty.

Under the decision of the Second Circuit Court there is no longer any freedom of contract fixing total take-home pay for a regular workweek exceeding 40 hours or on any workweek in excess of 40 hours. To illustrate:

(a) The parties agree upon a regular workweek of 46 hours and a regular weekly wage of $49.00 inclusive of overtime at 150% of the regular rate for all hours ex-

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[8] "Many such employees value the security of a regular weekly income. They want to operate on a family budget, to make commitments for payments on homes and automobiles and insurance. Congress has said nothing to prevent this desirable objective. This Court should not." 316 U. 624, at p. 635.

ceeding 40, the rate being determined by the formula, $49.00 divided by 49 equals regular hourly rate. Because there is no increase in the agreed weekly pay until the hours worked exceed 46, the agreement is invalid, says the Court below. That is this case.

(b) The parties agree upon a regular weekly wage of $40 per week for the first 40 hours work. They also agree upon an overtime rate of 150% for hours worked in excess of 40 and further agree that the regular workweek shall be 46 hours. By virtue of the agreement to work a regular workweek of 46 hours, the regular weekly pay is the same as in example (a) or $49.00. In practical effect, the agreed weekly pay is also $49.00 and the agreement is invalid under the Second Circuit test because the agreed weekly pay is not exceeded until the hours exceed 46 per week.

(c) The parties agree upon an express hourly rate of $1.00 per hour, an overtime rate of 150% that rate or $1.50 per hour for hours exceeding 40 per week and a regular workweek of 46 hours. Again, in practical effect, by virtue of the agreement to work a regular week of 46 hours, the agreed weekly pay is $49.00 as in both examples (a) and (b). As in those cases the agreement would be invalid, according to the Circuit Court.

Until the Second Circuit's decision in the present case, there would have been no reason for doubting the validity of plans (b) and (c). Under the *Missel* case, the regular hourly rate in examples (b) and (c) would be $1.00 per hour, the former by calculation, the latter by agreement.

In the light of the reasoning above, must employers and employees bargaining for wage agreements in industries having stable or regular workweeks, refrain from agreement on or specification of any regular workweek beyond 40 hours per week?

Assuming in examples (b) and (c) there was no agreement on or specification of the regular workweek but the

record showed a regular practice of working 46 hours, would not the Second Circuit find implied agreement to work 46 hours and condemn the arrangement?

During the war emergency the standard workweek in American industry became 48 hours or more. (Executive Order No. 9301.) In this period of manpower shortage when the NWLB Agreement was effective, were all labor agreements of the type illustrated by examples (b) and (c) which called for a workweek of 48 hours or more invalid for the reason stated by the Court below?

If the Second Circuit is sustained the only way to avoid that result is to draw a distinction between a contract for a fixed workweek and fixed weekly wage reducible by formula to an hourly rate on one hand and a contract for a fixed hourly rate and a fixed workweek converted by formula to a fixed weekly wage on the other hand. In other words, though the practical effect and result are identical, legality under the Act depends on whether the parties resort to division or multiplication.

The test advanced by the Second Circuit as the controlling one in this case finds no judicial support elsewhere. Certainly not in this court. The freedom of contract emphasized by the decisions of this Court under Section 7(a) discussed at the beginning of this argument, sanctions agreements by employers and employees upon a weekly "take home" pay, including overtime and subject to reduction by formula to an hourly rate, unless the purposes of the Act are thereafter evaded by total disregard of the hourly rate thus bargained.[9]

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[9]The case of *Watkins* v. *Hudson Coal Company*, 151 F. 2d 311 (C. C. A. 3) was cited against this proposition in Respondent's brief opposing certiorari in this case. However, in the *Watkins* case, the Court found that the hourly rates derived from the formula had not been applied and were, therefore, fictitious. The

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If the rates derived from the formula are the rates actually paid for non-overtime hours and for overtime hours a premium of at least 150% of the formula rates is paid, then inevitably the purposes of the Act are fulfilled. So, in essence, the question remains: Were the formula rates actually used in determining regular, non-overtime pay to the employees or were they merely a paper fiction having no demonstrable effect in determining their compensation?

(c) Circuit Court Ignored Record Facts Demonstrating Reality of Contract Rates.

The Circuit Court, while recognizing that the hourly rates derived from the formula were applied for purposes of overtime beyond the agreed regular workweek of 46 hours (which, incidentally, was the only demonstrable effect of the stated hourly rate in *Walling* v. *Belo*, 316 U. S. 624) totally disregards the fact, as found by the District Court, that these rates were actually used in determining compensation for both non-overtime and overtime hours when the employees worked less than the regular workweek. When an employee failed to report for work without excusable cause such as illness, and worked 40 hours or less per week, he was paid only for the hours actually worked on the basis of the formula rate. While there are no instances reflected in the pay-

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formula in that case under which the miners were never docked more than the regular daily rate regardless of the reason for absences, was also held bad because the rate derived did not "bear a real relation to actual earnings." This is merely another way of saying that a formula rate is invalid unless it is the rate actually paid for the non-overtime workweek, which was true of the formula rates in this case and in the earlier *Shepler* case in the Third Circuit, 140 F. 2d 371. Certiorari was denied in the *Watkins* case 327 U. S. 777, but no question involving the formula was presented by the petition.

Apparently the first Administrator of the Wage and Hour Division agreed even as to employees customarily unorganized. See footnote at p. 630 in *Walling* v. *Belo*, 316 U. S. 624.

rolls, if an employee in such a case worked more than 40 hours but less than 46, under the agreement he would have been paid the formula rate for the first 40 hours worked and time and one-half the formula rate for the hours beyond 40. It was so stipulated (R. 143-144). Where the hourly rate was applied for workweeks of less than 40 hours it could not be assumed that the rate would have been ignored for workweeks exceeding 40 hours but less than the regular workweek of 46 hours.

These facts, ignored by the Circuit Court, demonstrate positively that the formula rates were the real rates and that the petitioners paid a 50% premium for all hours exceeding 40 per week and not merely those exceeding the regular workweek of 46.

(d) Contractual provisions relating to excusable absences and holidays do not vitiate the contract rate as "the regular rate".

There are two types of cases reflected on the payrolls in this case where employees actually working less than forty (40) hours per week received more than the contract rate for hours worked. These situations were expressly treated by the stipulation of facts and there can be no justified basis for speculation about the proper interpretation of the payrolls on these points.[10]

The contractual provisions whereby employees did not lose the benefit of their normal overtime pay because of

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[10] Defendants' Exhibit B (R. 141-146):

"* * * 2. That throughout the period succeeding September 5, 1942, the situations referred to in the following subdivisions hereof were taken care of in the manner therein severally set forth as follows:

"(a) When during any workweek an employee was absent for part of that workweek because of 'sickness, or other excus-

(*Continued on following page*)

excusable absences for reasons such as their own illness, family sickness, deaths or funerals, or because of recognized holidays, shows no evasive departure from the contract rate in the "normal, non-overtime workweek". Obviously, such weeks are not "normal". If the payments made during such weeks are used to impeach the bona fides of the contract rate, then employees are to be penalized for following established and liberal practices. Many employers affected by the NWLB Agreement undoubtedly paid a full week's wage when absences were excusable. This is a common practice in business. Is ordinary kind-

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able causes' and therefore actually worked less hours than regularly scheduled, he was paid for those hours which would, but for those excusable absences, have exceeded 40 hours, at the rate of time and one-half the hourly rate as computed under the National War Labor Board agreement hereinafter in this paragraph 2 referred to as 'the contract'. Thus, an employee regularly scheduled to work 46 hours during the workweek who was absent for illness for two days (or 16 hours) was shown on the payrolls as working 24 hours of straight time for a compensation of 24 times the hourly rate as computed in the contract and six hours of overtime for a compensation of six times one and one-half times the hourly rate as computed in the contract. This was done pursuant to Sub-Division 5 (i) of Section III (Page 29 of Plaintiffs' Exhibit 1). For example, see Plaintiffs' Exhibit '6', payroll of Peterson, December 13 to December 19, 1942."

* * * *

"(d) Holidays not worked but paid for were treated as time worked in computing overtime hours under the National War Labor Board Agreement. Holidays, not worked, which are indicated by the symbol 'HD,' are not shown as hours worked, but the employee is credited with those number of hours which normally and except for the holiday would have been designated as overtime hours and paid therefor at the rate of one and one-half times the hourly rate as computed in the contract. Thus, an employee who did not work but was paid for a holiday (8 hours) is shown as working 38 hours and receiving compensation therefor at 40 times the hourly rate as computed in the contract and six times one and one-half times the hourly rate as computed in the contract. For example, see Plaintiffs' Exhibit '6', payroll for November 22 to November 28, 1942."

ness and decency in employer-employee relations to be penalized by saying that an overpayment of this character destroys the reality of the contracted hourly rate?

During the war emergency by virtue of Executive Order 9240, war contractors were required in certain cases and permitted in others to treat certain designated holidays, though not paid for, as working time for purposes of computing overtime.[11] Inevitably this practice has continued and will continue in post-war labor agreements. The salutary purpose of these provisions is identical with that of the NWLB Agreement, to save the employee from loss of overtime where his absence is without fault or because of shutdowns due to recognized holidays. Any interpretation of the Act which gives weight to these and similar practices as evidence that the contract rate has not been applied in non-overtime workweeks, punishes enlightened labor relations, hamstrings collective bargaining and injures those for whose benefit the Act was passed.

The Circuit Court's ruling leads to an unrealistic and unmoral result. It takes an unambiguous contract, entered into after protracted negotiations and under the direction of a governmental agency—and a contract under which the parties have operated with mutual recognition of their mutual intentions—and proceeds to destroy its wage provisions and substitute for them a wage rate which is not based on agreement, *quantum meruit* or statute.

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[11] Opinion of Secretary of Labor on meaning of Premium Pay Order, Interpretative Bulletin No. 1, issued February 18, 1943:

> "18. For purposes of computing the seventh day of work in a workweek under the Order, the designated holidays must be included in the count whether or not work is performed on such days. An idle holiday should be included in computing the sixth day worked in the workweek unless the employment contract specifies otherwise."

We submit that where there was no overreaching and the intention of the parties and the National War Labor Board was to comply with the Act, every reasonable presumption and inference should be relied upon to avoid an unconscionable result.

II

CONCLUSION

The judgment of the Court below should be reversed.

Respectfully submitted,

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of Counsel.

Dated: January, 1947.

Appendix A

Hourly Rates of Respondents under Sloan Agreement as of April 20, 1942 Computed on *Missel* Formula and for Period, April 21, 1942 to December 10, 1943 Computed in Accordance with NWLB Agreement.

Plaintiff's Name	Period	Rates Hourly.
Del Rio	Sloan Agreement 4/20/42	.532
	4/21/42— 8/ 8/42	.544
	8/10/42— 4/20/43	.561
	4/21/43—12/10/43	.589
Manne	Sloan Agreement 4/20/42	.532
	4/21/42— 8/ 8/42	.544
	8/10/42— 4/20/43	.561
	4/21/43—12/10/43	.589
McCole	Sloan Agreement 4/20/42	.416
	4/21/42— 6/13/42	.392
	6/15/42— 8/ 8/42	.401
	8/10/42— 4/20/43	.45
	4/21/43—12/10/43	.473
Peterson	Sloan Agreement 4/20/42	.532
	4/21/42— 8/ 8/42	.544
	8/10/42— 4/20/43	.561
	4/21/43— 8/ 7/43	.589
Torra	Sloan Agreement 4/20/42	.596
	4/21/42— 8/ 8/42	.604
	8/10/42— 4/20/43	.622
	4/21/43—12/10/43	.651
J. H. Berger*	as of 4/20/42	.833
	4/21/42— 9/12/42	.769
	9/14/42— 3/20/43	.865
	3/21/43—12/10/43	.962
Rodriguez (Sanchez)*	as of 4/20/42	.638
	4/21/42— 8/ 8/42	.577
	8/10/42— 1/25/43	.612

* Berger and Rodriguez were not members of Local 32-B and not subject to NWLB Agreement as such.